No. 01-838

In The

Supreme Court of the United States

JOHNNY REYNOLDS, *et al.*,

Petitioners,

v.

G.M. ROBERTS, in his official capacity as Director of the Alabama Department of Transportation, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS PAUL BOWLIN *et al.*

[Respondents Continued On Inside Cover]

SUSAN S. WAGNER
Counsel of Record
LISA W. BORDEN
BERKOWITZ, LEFKOVITS, ISOM & KUSHNER
A PROFESSIONAL CORPORATION
SouthTrust Tower
420 North 20th Street, Suite 1600
Birmingham, Alabama 35203-5202
(205) 328-0480

Counsel for Respondents Paul Bowlin, et al.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESPONDENTS – Continued

Paul Bowlin, in his official capacity as Director of the Alabama Department of Transportation

State Personnel Department, State of Alabama

State of Alabama

Donald Siegelman, in his official capacity as Governor of the State of Alabama

Ray Bass

Marvin Wagoner

Thomas G. Flowers, in his official capacity as Director of the State Personnel Department

TABLE OF CONTENTS

Page

Table of Authorities ii

Statement of the Case 1

A. Proceedings in the District Court 1

1. Proceedings Leading to Consent Decree 1

2. Article Thirteen, ¶ 4 and Related Provisions 4

3. Defendants' Withdrawal of Support for Consent Decrees I and II 6

4. Proceedings Leading to Challenged Order .. 7

B. The Court of Appeals' Decision 10

Reasons For Denying The Petition for Writ of Certiorari 11

I. There Is No Circuit Split with Respect to an Intervenor's Right To Object to or "Veto" a Consent Decree that Adversely Affects His or Her Legal Rights 12

A. The Eleventh Circuit Decisions 13

B. Decisions of Other Circuits 18

II. There Is No Circuit Split with Respect to a Party's Right To Withdraw Its Consent to a Proposed "Consent Order" that Has Not Received the Consent of all Parties and Violates Third Parties' Constitutional and Statutory Rights ... 23

III. The Issues Raised in the Petition Are Not Dispositive, Because the Eleventh Circuit's Other Grounds for Reversing the District Court's Order Are Not Challenged 27

Conclusion 28

TABLE OF AUTHORITIES

Page

CASES:

In re Birmingham Reverse Discrimination Employment Litig., 20 F.3d 1525 (11th Cir. 1994), *cert. denied*, 514 U.S. 1065 (1995) 6, 7, 26

Brooks v. Georgia State Bd. of Elections, 59 F.3d 1114 (11th Cir. 1995) 11

Collins v. Thompson, 679 F.2d 168 (9th Cir. 1982) 24

Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977) 11

Dennison v. City of Los Angeles Dept. of Water & Power, 658 F.2d 694 (9th Cir. 1981) 20

Edwards v. City of Houston, 37 F.3d 1097 (5th Cir. 1994), *vacated*, 78 F.3d 983 (5th Cir. 1996) (en banc) 18, 19

Ensley Branch, NAACP v. Seibels, 31 F.3d 1548 (11th Cir. 1994) 6, 7, 26

George Banta Co. v. NLRB, 604 F.2d 830 (4th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980) 24

Ibarra v. Texas Employment Comm'n, 823 F.2d 873 (5th Cir. 1987) 24, 25

King v. Walters, 190 F.3d 784 (7th Cir. 1999) 24

Kirkland v. New York State Dept. of Correctional Servs., 711 F.2d 1117 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984) 20

Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) ... 13, 14, 15, 16, 23, 27

TABLE OF AUTHORITIES – Continued

Page

Moore v. Beaufort County, 936 F.2d 159 (4th Cir. 1991) 24

Pennsylvania Steel Foundry & Mach. Co. v. Secretary of Labor, 831 F.2d 1211 (3rd Cir. 1987) 24

Sanguine, Ltd. v. United States Dept. of Interior, 798 F.2d 389 (10th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987) 22

Tennessee Ass'n of Health Maintenance Orgs., Inc. v. Grier, 262 F.3d 559 (6th Cir. 2001) 22

United States v. City of Hialeah, 140 F.3d 968 (11th Cir. 1998) 10, 13, 14, 16

United States v. City of Miami, 664 F.2d 435 (5th Cir. 1981) (en banc) 14, 16, 17, 18, 20

United States v. Comunidades Unidas Contra La Contaminacion, 204 F.3d 275 (1st Cir. 2000) 21

United States v. North Carolina, 180 F.3d 574 (4th Cir. 1999) 24

United States v. Oregon, 913 F.2d 576 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991) 21, 22

United States v. Union Elec. Co., 132 F.3d 422 (8th Cir. 1997) 21

White v. Alabama, 74 F.3d 1058 (11th Cir. 1996) 10, 11, 14, 15, 17, 24

Youngblood v. Dalzell, 804 F.2d 360 (6th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987) 22

STATUTE:

ALA. CODE § 36-26-23 (1975) 13, 18

STATEMENT OF THE CASE

A. Proceedings in the District Court

1. Proceedings Leading to Consent Decree I

Six African-Americans brought this suit against Defendants/Respondents Alabama Department of Transportation ("ALDOT"), State Personnel Department ("SPD"), and various state officials (collectively "defendants") in May 1985, alleging that defendants had discriminated against them in their employment because of their race. Pet. App. 3a. In October 1986, the district court certified three plaintiff classes: (1) all black merit system employees of ALDOT employed at any time since May 21, 1979; (2) all black non-merit system employees of ALDOT who had unsuccessfully applied for merit system employment since May 21, 1979; and (3) all black non-employees who had unsuccessfully applied for merit system employment since May 21, 1979. Pet. App. 3a n.2. The district court later combined classes two and three.

Although the parties reached a full settlement of the case in both 1988 and again in 1991, the district court refused to approve the first proposed settlement, and the second settlement collapsed after a large number of class members opted out and defendants exercised their right to withdraw. Pet. App. 4a. In June 1992, the case proceeded to trial before the district court. *Id.* After several months of trial, but before plaintiffs rested, the court granted the parties' request for an indefinite recess for the purpose of settlement negotiations. In November 1993, the parties reached a partial settlement and presented a proposed consent decree to the court, which provided for broad classwide relief, but left monetary

and non-monetary claims of individual class members for subsequent trial. Pet. App. 4a. The decree was preliminarily approved by the district court, pending notice to class members and a fairness hearing.

The proposed consent decree contained provisions requiring sweeping changes in ALDOT's hiring and promotion policies, including alterations of the procedures for appointment of employees in various job classifications and an ambitious set of race-conscious hiring and promotional quotas designed to achieve 33.3% black representation in all merit system jobs at ALDOT. Pet. App. 4a.

In January 1994, before the fairness hearing, a group of non-black ALDOT employees (the "Adams Intervenors") moved to intervene in the lawsuit on behalf of themselves and all ALDOT employees who were not part of the plaintiff classes. *Id.* The Adams Intervenors filed objections to certain race-conscious provisions of the consent decree, such as the 33.3% quota requirement for all ALDOT job classifications, claiming that these provisions would adversely affect their interests and discriminate against them on the basis of race. The motion to intervene was granted in February 1994, and, in April 1998, the district court certified the Adams Intervenors as a class "for the purpose of intervention, that is to challenge the race-conscious provisions of the consent decrees." Pet. 3.

One of the specific provisions to which the Adams Intervenors objected was Article Thirteen, ¶ 4, the provision at issue in this proceeding. This paragraph requires defendants to promote to the Graduate Civil Engineer ("GCE") job classification any black ALDOT employee

who has a college degree in civil engineering or civil engineering technology, but is not already employed in a professional engineering job classification, regardless of whether the employee (a) ever applied for the GCE job classification or (b) can show that the defendants' allegedly discriminatory job requirements precluded him from applying. Pet. App. 52a.

More than 200 people attended the January 19, 1994 fairness hearing, including many non-black ALDOT employees. Pet. App. 5a. The objections to the race-conscious aspects of the proposed consent decree were such that the parties withdrew it and, with leave of court, went back to the drawing board. By late February 1994, the plaintiffs and defendants decided to divide the previously proposed decree into three parts, called Consent Decrees I, II, and III. Consent Decree I contained the provisions (some of which were modified as a result of negotiations with the Adams Intervenors) that all sides agreed provided only race-neutral prospective relief. Consent Decree II contained provisions that the Adams Intervenors contended were impermissibly race-conscious, but that the plaintiffs contended were race-neutral. Consent Decree III contained provisions that all parties agreed were race-conscious.

The parties submitted Consent Decree I to the district court for approval, and, on March 7, the court held a hearing on the fairness of the proposal. No one other than the parties' attorneys appeared at the hearing, and no one objected to the entry of the decree. The court approved Consent Decree I and, by order entered March 16, 1994, adopted it in full. Pet. App. 6a. The district court noted

that it would "consider final approval of Consent Decrees II and III separately at a later time." Pet. App. 6a.

2. Article Thirteen, ¶ 4 and Related Provisions

By this action, the plaintiffs attacked a broad range of defendants' hiring and promotional policies, including the requirements for appointment and promotion as an engineer. Among other things, plaintiffs challenged as discriminatory the requirement of successful completion of the Engineer in Training ("EIT") examination for appointment to the GCE job classification. Plaintiffs claimed that the EIT requirement was imposed for the discriminatory purpose of rejecting black applicants whom defendants would otherwise have been required to hire as GCEs.

The parties' original proposed Consent Decree contained numerous provisions related to the EIT requirement and the GCE job classification. With the sole exception of Article Thirteen, ¶ 4, these provisions were entered as part of Consent Decree I. For example, under Consent Decree I:

1. EIT status cannot be used as either a minimum requirement or as a scoring, ranking, or certification device for the GCE job classification. Pet. App. 142a.

2. ALDOT is required to notify all recruitment sources and to advertise in Alabama newspapers that EIT certification is no longer a requirement for appointment to the GCE job classification and that Black engineers are invited to apply. Pet. App. 149a-150a.

3. A number of African-Americans injured by the EIT requirement were granted immediate appointment to the GCE position or "the job they would now hold" in the absence of the EIT and associated requirements. These included ten black employees who were listed on the register for the GCE classification in 1983, when the register was abolished and the EIT requirement was instituted. Pet. App. 144a-145a.

4. Preferential hiring consideration is given to an even larger group of African-Americans injured or potentially injured by the EIT requirement. Pet. App. 150a-151a.

The Adams Intervenors did not object to any of these provisions, and all of them have been entered by the district court and have either been implemented or are being implemented by defendants. The sole EIT-related provision challenged by defendants and Adams Intervenors is the provision that was entered four years later and is the subject of this appeal: Article Thirteen, ¶ 4. Pet. App. 52a. That provision grants an automatic promotion to any black employee who has a degree in civil engineering or civil engineering technology, but nonetheless holds a job at a lower level than the GCE job classification, even if that employee never applied for the GCE classification and cannot show that he or she would have applied in the absence of the EIT requirement.

Defendants take issue with plaintiffs' contention that the "reclassifications" required by Article Thirteen, ¶ 4 would simply change the title of the position already held by the benefited employee and would not fill any

vacancy that would otherwise be available for competitive appointment. Pet. 5. This statement not only lacks evidentiary support, but also is untrue. The personnel system provides specifications for the kinds of work to be performed by employees in each classification. If an employee's duties in his or her current classification were not proper for a GCE, the duties would have to be changed upon redesignation of that employee as a GCE. Furthermore, ALDOT's organization calls for GCEs in certain types of positions. If an employee is designated as a GCE, one of those positions may well become filled.

As a corollary, plaintiffs also incorrectly state that GCE is the "correct classification nomenclature" for a degreed engineer. Pet. 5. The GCE classification does require a degree, but there are degreed engineers in other engineering classifications as well.

3. Defendants' Withdrawal of Support for Consent Decrees II and III

In November 1995, the district court ordered plaintiffs, defendants, and Adams Intervenors to address the legality of Consent Decrees II and III in light of the Eleventh Circuit's decisions in *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548 (11th Cir. 1994), and *In re Birmingham Reverse Discrimination Employment Litig.*, 20 F.3d 1525 (11th Cir. 1994), *cert. denied*, 514 U.S. 1065 (1995). Pet. App. 10a n.11. These two cases, decided after plaintiffs and defendants had negotiated the original consent decree and submitted it to the district court for approval, addressed the legality under Title VII and the Equal

Protection Clause of certain race-conscious provisions of consent decrees entered into by government employers.

Defendants concluded that *Ensley Branch* and *In re Birmingham* "substantially clarified the application of previous Supreme Court precedent" to race-conscious provisions in consent decrees and displayed a significantly more skeptical approach to race-conscious settlements than had prior Eleventh Circuit decisions. Pet. App. 10a n.11. Based on these new decisions, defendants concluded that the race-conscious provisions of Consent Decrees II and III violated both the Equal Protection Clause and Title VII. Pet. App. 10a. Defendants therefore objected to entry of Consent Decrees II and III and asked the district court to modify Consent Decrees II and III to eliminate race-conscious provisions because the obligations placed on defendants under those agreements "had become impermissible under federal law." Pet. App. 10a-11a n.11.

It should be noted that, unlike the Court of Appeals, defendants did not characterize their changed position on Consent Decrees II and III as a withdrawal of consent. Instead, defendants argued that the illegality and unconstitutionality of Consent Decrees II and III should preclude their approval by the district court.

4. Proceedings Leading to Challenged Order

In October 1997, in the midst of a seven-month trial of plaintiffs' individual claims in this action (which had not been settled by Consent Decree I), the district court asked the Adams Intervenors to state their position on the legality of Article Thirteen, ¶ 4. Pet. App. 8a n.9. The

Adams Intervenors replied that this provision was impermissible, because it granted promotions to black employees who neither applied for the GCE job nor would have applied but for challenged job requirements. The Adams Intervenors concluded that Paragraph 4 was race-conscious and not remedial, because it was not tied into identifying actual victims of discrimination and making them whole.

On January 14, 1998, the district court asked the parties whether black ALDOT employees who fell within the terms of Article Thirteen, ¶ 4 would be entitled to back pay. The district court then asked the Adams Intervenors to restate their objections to the provision. Pet. App. 8a n.9. Once again, the Adams Intervenors explained that Article Thirteen, ¶ 4 was unlawful because it applied to black employees who had never applied for the GCE classification and had not been deterred from applying by the EIT requirement, and hence had never been injured by the challenged EIT requirement. The court also asked for a clarification of the defendants' position. Defendants replied unequivocally that they objected to the challenged paragraph. *Id.* On January 16, 1998, the district court asked plaintiffs how many black ALDOT employees would be affected by Article Thirteen, ¶ 4. *Id.*

The district court never permitted the defendants or Adams Intervenors to present evidence in support of their objections to Article Thirteen, ¶ 4 or to any other race-conscious provisions of Consent Decrees II and III. Instead, the defendants and Adams Intervenors have been permitted to argue based only on evidence received in the plaintiffs' case during the 1992 partial trial. On

January 23, 1998, without further argument or briefing by the parties on the legality of Article Thirteen, ¶ 4, and with no briefing or argument whatsoever about the propriety of entering a single provision from Consent Decree II, the district court entered an order and injunction adopting Article Thirteen, ¶ 4. Pet. App. 8a; Pet. App. 16a. The order, which overruled defendants' and the Adams Intervenors' objections to the provision and denied defendants' request to modify it to comply with Title VII and the Equal Protection Clause, enjoined defendants from failing to implement Article Thirteen, ¶ 4. Pet. App. 44a.

In entering this order, the district court gave a comprehensive summary of evidence presented by plaintiffs during the aborted 1992 trial. Most of the evidence cited by the court had no relationship to the EIT requirement, the GCE job classification, or Article Thirteen, ¶ 4. None of the evidence was analyzed to determine whether the challenged race-conscious provision was necessary or appropriate, particularly in light of the many provisions in Consent Decree I that were specifically tailored to remedy any past injury with respect to the EIT requirement and GCE classification. Moreover, contrary to plaintiffs' characterization, Pet. 5, the district court could not make factual "findings" with respect to the appropriateness or necessity of the challenged provision based solely on the plaintiffs' evidence from the interrupted 1992 trial without giving defendants or the Adams Intervenors the opportunity to rebut this evidence.

B. The Court of Appeals' Decision

The Court of Appeals reversed the decision of the district court on two independently sufficient grounds. First, the Court of Appeals found that Consent Decrees II and III in general, and Article Thirteen, ¶ 4 in particular, "[l]ack[ed] the consent of all of the parties." Pet. App. 13a. Accordingly, the Court held that the district court had no power to enter the decree "purportedly based on consent." Pet. App. 13a. Second, the Court concluded that the district court's entry of the challenged paragraph *sua sponte* was "procedurally improper." Pet. App. 15a. The Petition does not challenge this alternative holding as to the procedural irregularities in entering the order.

The Court of Appeals' conclusion that Article Thirteen, ¶ 4 "[l]ack[ed] consent of all of the parties" was in turn based on the following:

1. The Adams Intervenors, whose legal rights would be affected by the provision, had not consented:

> [T]he intervenors have legal rights at stake in this litigation, namely rights under the Equal Protection Clause, Title VII, and state merit-system law to compete for state jobs on a race-neutral basis. The clear law of this circuit is that "a consent decree requires the consent of all parties whose legal rights would be adversely affected by the decree." *United States v. City of Hialeah*, 140 F.3d 968, 975 (11th Cir. 1998); *see also White v. Alabama*, 74 F.3d 1058, 1073 (11th Cir. 1996) ("In this circuit, a decree that provides a remedy agreed to by some, but not all, of the parties cannot affect the rights of a dissenting

> party."); *id.* at 1076 (Black, J., specially concurring) ("Once a party intervenes, he becomes a full participant and is entitled to have his claims litigated."). The consent of the intervenors is thus needed for the challenged paragraph to be entered as a "consent decree."

Pet. App. 11a-12a n.12.

2. The defendants had "withdrawn" their consent after informing the district court that they believed that Consent Decrees II and III were unconstitutional. Pet. App. 10a.

3. "Pulling one isolated paragraph out of a proposed consent decree runs counter even to what the parties originally agreed upon back in 1993, for a 'settlement must stand or fall as a whole.' " Pet. App. 13a (quoting *Brooks v. Georgia State Bd. of Elections*, 59 F.3d 1114, 1120 (11th Cir. 1995) (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1331-32 (5th Cir. 1977))).

Of these three alternative grounds for finding that the challenged provision could not be entered as a "consent" order, the Petition challenges only the first two.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

There are no compelling reasons for granting the writ in this case. Contrary to plaintiffs' argument, there is no circuit split as to either of the issues addressed in the Petition. Moreover, the Eleventh Circuit cited two other, independently sufficient reasons for its ruling, which are not even challenged in this proceeding. Accordingly,

defendants submit that the Petition presents no issue worthy of this Court's review.

I. There Is No Circuit Split with Respect to an Intervenor's Right To Object to or "Veto" a Consent Decree that Adversely Affects His or Her Legal Rights

Plaintiffs argue that the Eleventh Circuit's decision in this case is in direct conflict with decisions of other courts of appeals by holding "that the consent of non-minority employees is needed for black employees to settle lawsuits for racial discrimination against their employers." Pet. 8-9. The Eleventh Circuit did not so hold. Rather, it held that the Adams Intervenors' consent would be required in this case, because they "have legal rights at stake in this litigation, namely rights under the Equal Protection Clause, Title VII, and state merit-system law to compete for state jobs on a race-neutral basis." Pet. App. 11a n.12.

Quite simply, the rights of intervenors with respect to consent decrees are not an all or nothing proposition. The Eleventh Circuit has never held that all intervenors may veto consent decrees, and no other court has held that intervenors never have the right to do so. Each case, whether in the Eleventh Circuit or elsewhere, turns on whether the consent decree affects the legal or property rights of the intervenor. An intervenor's vested legal rights may not be compromised without due process. Therefore, if those rights would be adversely affected by a proposed consent decree, the intervenor is entitled to a full evidentiary hearing on the merits. As the Eleventh

Circuit held in *United States v. City of Hialeah*, 140 F.3d 968 (11th Cir. 1998):

> It is true that opposition to a proposed consent decree will not always operate as a bar to it. . . . However, the objection of a party whose rights or claims would be adversely affected does bar a proposed consent decree.

Id. at 975.

The paragraph at issue in this case grants certain promotions based on race without regard to whether the promoted employee even claims to have been a victim of racial discrimination. There can be no serious doubt that such a provision "adversely affects" the legal rights of members of the Adams Intervenor class who might otherwise be able to compete for promotions into those positions on a race-neutral basis. In addition to their rights under the Constitution and Title VII, such intervenors are entitled, as public employees, to the protection of Alabama's merit system law, which expressly provides that "[p]romotion shall be based on merit and competition." ALA. CODE § 36-26-23 (1975).

Because the provision at issue would adversely affect the legal rights of the Adams Intervenors, the decision in this case does not conflict with any decision of this Court, the Eleventh Circuit, or any other Court of Appeals.

A. The Eleventh Circuit Decisions

As the Eleventh Circuit has recognized, the intervenors' rights are controlled by this Court's decision in *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986). In *Local No. 93*, this Court held the

district court could enter a consent decree in an employment discrimination case over the objections of the Union, which had been permitted to intervene. *Local No. 93* certainly stands for the proposition that intervention alone – even intervention of right – does not confer upon a party the right to veto all proposed consent decrees. This Court expressly recognized, however, that such consent decrees could not "dispose of the claims of a third party . . . [or] impose duties or obligations on a third party, without that party's agreement." 478 U.S. at 529. Moreover, the Court's decision was premised on its assessment that "the consent decree does not purport to resolve any claims the Union might have under the Fourteenth Amendment, . . . under § 703 of Title VII, . . . or as a matter of contract." 478 U.S. at 530 (citations omitted).

In its first decision to address this issue, *White v. Alabama*, 74 F.3d 1058 (11th Cir. 1996), the Eleventh Circuit relied on *Local No. 93* and on controlling precedent from the former Fifth Circuit, namely, *United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981) (en banc), in concluding that "a decree that provides a remedy agreed to by some, but not all, of the parties cannot affect the rights of a dissenting party." *Id.* at 1073.

Two years later, in *Hialeah*, the Eleventh Circuit again held that "to the degree a consent decree diminishes a party's legal rights, it cannot be entered over that party's objections." 140 F.3d at 978. In reaching this conclusion, the court engaged in a comprehensive analysis of *Local No. 93* to determine whether, as urged by the dissenting opinion, *Local No. 93* conflicted with *White* or *City of Miami*. The *Hialeah* court concluded that Eleventh Circuit

law was completely consistent with *Local No. 93*, reasoning:

> [E]ven if we were writing on a clean slate we would interpret *Local No. 93* the same way *White* did.
>
> . . . [*Local No. 93*] explicitly recognizes that a consent decree cannot dispose of the contractual rights of objecting parties. The *Local No. 93* Court affirmed entry of the consent decree in that case because "the consent decree does not purport to resolve any claims the Union might have . . . as a matter of contract." 478 U.S. at 530, 106 S. Ct. at 3079. The union intervenor in *Local No. 93*, unlike the intervenors in this case, did not assert any legal rights that would be impinged by the consent decree. *See* 478 U.S. at 508-11, 106 S. Ct. at 3067-69. Apparently, no established collective bargaining rights were affected by the decree, because the union did not contend that any were.
>
> As the Supreme Court pointed out in *Local No. 93*, the district court provided the objecting union with several opportunities to advance specific objections and to develop evidence to substantiate those objections; the court even informed the union that vague appeals to fairness could not prevent entry of the decree. *See id.* at 528-29, 106 S. Ct. at 3078-79. Instead of detailing specific claims as to how the decree would impair the rights of its members, the union merely protested that "there must be a more equitable, fair and just way to correct the problems caused by the [City]," and that it was totally opposed "to the use of racial quotas which must by their very nature cause serious racial polarization." *Id.* at 511, 106 S. Ct. at 3069.

> As the Supreme Court characterized it, the union simply "express[ed] its opinion as to the wisdom and necessity of the proposed consent decree." *Id.* That is entirely unlike *City of Miami* and this case, where the intervenors have objected based upon their specific legal rights under Florida law, rights that the decree would abrogate.

Id. at 979-80 (footnotes omitted).

The *Hialeah* opinion also rejected the dissenting opinion's conclusion that, under *Local No. 93*, "an objecting party's existing legal rights can be sacrificed to the interests of the other parties, without a trial, so long as the intrusion on those rights does not obligate that party 'to do or not to do anything' ":

> That would mean, for example, that the other parties could agree to use a "consent decree" to cut the wages of the objecting union members, in violation of their contractual rights, if the other parties deemed it necessary and appropriate to do so in order to fund aspects of the remedy put into place by the decree. Under the rule advocated by the dissenting opinion, the union members whose wages were being cut over their vehement objection would not be entitled to bar the settlement or to insist upon a trial. What would matter is that they were not being ordered to do anything by the decree. The City could take care of the paperwork and other affirmative acts necessary to actually reduce their compensation. Such are the implications of the dissenting opinion's interpretation of *Local No. 93*, which is an interpretation we are

> confident never occurred to the Supreme Court, and is also an interpretation foreclosed by *White*.

Id. at 980.

Plaintiffs contend that, prior to its decision in this case, the Eleventh and former Fifth Circuits had given veto rights only to intervenors "who had pre-existing *contractual rights* that were being involuntarily forced to yield to a consent decree that they opposed." Pet. 13. Again, the Petition mischaracterizes the case law in an attempt to create the appearance of a conflict. In *White*, which is not cited in the Petition, the right that was jeopardized by the proposed consent decree was not contractual, but was the intervenors' "right to vote for judicial officers." 74 F.3d at 1074.

Moreover, the decision in *City of Miami* was based, ultimately, on a conflict between the consent decree and a Miami Civil Service Ordinance providing "that eligibility for promotion was determined solely on the basis of the employee's score on a civil service test." 664 F.2d at 446. Because the intervenor in *City of Miami* was a union, rather than a class of affected employees, the conflict between this ordinance and the consent decree did not end the inquiry as to the intervenor's rights. Rather, the court was required to look to the collective bargaining agreement to determine whether the union had standing. Because the agreement provided that the ordinance was to "remain in full force and effect for the duration of this Agreement," the court concluded that the consent decree could not be entered without the Union's consent. *Id.* If the intervenors had been the employees themselves, rather than the union, the employees' direct rights under

the ordinance would have been entitled to the same deference.

Like the union members in *City of Miami*, the Adams Intervenors have statutory rights to compete for civil service positions on a race-neutral basis. ALA. CODE § 36-26-23 (1975). Thus, contrary to plaintiffs' arguments, the Eleventh Circuit was not required to "extend" its precedent in order to conclude that the challenged paragraph of Consent Decree II would have required the consent of the Adams Intervenors, because "the intervenors have [Constitutional and statutory] legal rights at stake in this litigation." Pet. App. 11a n.12.

B. Decisions of Other Circuits

The Petition contends that, unlike the Tenth and Eleventh Circuits, other circuits have held that "third-party intervenors have no right of consent or veto over settlements by other parties." Pet. 12. Contrary to this argument, none of the cases plaintiffs cite from other jurisdictions holds that an intervenor is never entitled to insist on a trial on the merits. Rather, these cases, like those of the Eleventh and former Fifth Circuits, turn on whether the intervenor's legal rights would be adversely affected by the proposed consent decree.

1. *Edwards v. City of Houston*, 37 F.3d 1097 (5th Cir. 1994), *vacated*, 78 F.3d 983 (5th Cir. 1996) (en banc). As plaintiffs acknowledge, the 1994 panel decision in *Edwards* was vacated. Plaintiffs' characterization of this vacatur as being "on other grounds" is questionable. Even more importantly, the quotation cited at Pet. 12-13 is

not from the vacated majority opinion, but from the concurring opinion of Judge Parker, who joined in the dissenting opinion in the 1996 *en banc* review. Needless to say, Judge Parker's concurring opinion cannot be cited as circuit precedent.

The 1996 majority opinion of the Fifth Circuit *en banc* addressed only the issues before the court, which were (a) whether the district court erred in denying the appellants' motion to intervene and (b) whether that error was harmless. On the issue of harmlessness, the court differentiated between the rights of objectors and intervenors, holding that intervenors have the right not only to argue and brief the issues, but to participate in discovery and present evidence. There is no indication that the would-be intervenors even argued that they had the right to a full trial on the merits.

Plaintiffs' reliance on *Edwards* is particularly surprising in light of the Fifth Circuit's discussion of the rights of intervenors. After noting that the putative intervenors had not been permitted to participate in discovery or present witnesses at the "fairness hearing," the court concluded:

> The perfunctory process employed in this case belittles our notion of fairness. That these applicants were deprived not only of the opportunity to participate in this proceeding with the rights and privileges of full parties, but also of the opportunity to adequately prepare and present objections to the proposed decree, precludes us from concluding that the district court's denial of intervention was harmless.

78 F.3d at 1003. The process employed in the present case did not meet these standards of fairness.

2. *Kirkland v. New York State Dept. of Correctional Servs.*, 711 F.2d 1117 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). In *Kirkland*, the court expressly acknowledged that an intervenor may have the right to "force a trial," depending on "the nature of the intervenor's interest." The court held:

> [T]he sum of rights possessed by an intervenor, even if granted unconditional intervention, is not necessarily equivalent to that of a party in a case and depends upon the nature of the intervenor's interest.

Id. at 1126. The court's decision that the non-minority intervenors did not have the right to insist on a trial was based on its assessment that the intervenors' interest was limited to "their mere expectation of promotion pursuant to possibly discriminatory selection procedures." *Id.* at 1128. Significantly, the court distinguished the Eleventh Circuit's *City of Miami* decision on the facts, rather than expressing disagreement with its holding.

3. *Dennison v. City of Los Angeles Dept. of Water & Power*, 658 F.2d 694 (9th Cir. 1981). In *Dennison*, the union did not contend that its legal rights were infringed by the consent decree. In fact, although it had notice of the action before the fairness hearing, the union never sought to intervene. Rather, the union later filed a separate action seeking monetary compensation for two non-minority employees who alleged that they were adversely affected by the consent decree. The court held that this suit was an impermissible collateral attack on

the consent decree. Thus, in commenting that the fairness hearing had "adequately afforded the union an opportunity" to express its views, the court was not expressing an opinion as to the due process rights the union would have had if its legal rights had been jeopardized by the consent decree and if it had sought to intervene. *Id.* at 696.

4. *United States v. Union Elec. Co.*, 132 F.3d 422 (8th Cir. 1997). The court held that intervenors have no "*unconditional* right to an evidentiary hearing" (emphasis added) and that, because the intervenors were "not bound by" the Consent Decree's allocation formula to which they objected, the district court did not abuse its discretion in denying a hearing. *Id.* at 430.

5. *United States v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275 (1st Cir. 2000). *Comunidades*, a community organization, intervened in an action brought by the government to redress alleged violations of the Clean Water Act and other environmental statutes. *Comunidades* did not contend that its legal rights were infringed by the consent decree. The court did not hold that an intervenor is never entitled to a trial on the merits, but only that there is "no *unconditional* right to an evidentiary hearing." *Id.* at 279 (emphasis added).

6. *United States v. Oregon*, 913 F.2d 576 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991). The State of Idaho opposed the proposed decree, not on the basis that it infringed any legal rights, but "chiefly because it provides insufficient protection for Idaho wild steelhead, which Idaho believes could face extinction." *Id.* at 580. The court held that the district court properly could deny

Idaho the right to cross-examine witnesses at the fairness hearing. *Id.* at 582.

7. *Tennessee Ass'n of Health Maintenance Orgs., Inc. v. Grier,* 262 F.3d 559 (6th Cir. 2001) ("*Grier*"). In *Grier,* the court held that the intervenors could be bound by the consent decree over their objections, because they contractually agreed to be bound and because they were agents of the State, one of the consenting parties. *Id.* at 565. Not surprisingly, the court held that the intervenors could voice their objections, but had no right to an evidentiary hearing. *Id.* at 567.

8. *Youngblood v. Dalzell,* 804 F.2d 360 (6th Cir. 1986), *cert. denied,* 480 U.S. 935 (1987). In *Youngblood,* in contrast with the Eleventh Circuit's decision in *City of Miami,* the court found that the "consent decree did not interfere with any right secured by collective bargaining" and "imposed no duties or obligations on the [intervenor] union." *Id.* at 364. Accordingly, the court held that the consent decree "is not invalid merely because the union did not agree to it." *Id.*

9. Finally, as the Petition acknowledges, *Sanguine, Ltd. v. United States Dept. of Interior,* 798 F.2d 389 (10th Cir. 1986), *cert. denied,* 479 U.S. 1054 (1987), is entirely consistent with the Eleventh Circuit's decision in the present case in holding that an intervenor is entitled to a trial where his "valuable property rights" are at stake. *Id* at 392.

Thus, contrary to plaintiffs' argument, there is no circuit split with respect to the rights of intervenors objecting to proposed consent decrees. In each case, the intervenors' due process rights depend upon the nature

of their interests. Accordingly, this issue need not be addressed by this Court.

II. There Is No Circuit Split with Respect to a Party's Right To Withdraw Its Consent to a Proposed "Consent Order" that Has Not Received the Consent of all Parties and Violates Third Parties' Constitutional and Statutory Rights

Defendants had the right to withdraw their consent to Consent Decrees II and III for two reasons. First, as discussed above, the Consent Orders required the consent not only of the plaintiffs and defendants, but also of the Adams Intervenors, who were necessary parties with respect to their race-conscious provisions. Although the court's approval of a consent decree might be regarded as a condition *subsequent*, a condition *precedent* to the formation of a contract is the agreement of all parties. If two parties "agree" to settle a three-party dispute, they are both free to withdraw from the "agreement" if the third party does not acquiesce. Consequently, Consent Decrees II and III never rose to the level of enforceable agreements, and plaintiffs and defendants were both free to withdraw their consents in light of the objections of the Adams Intervenors.

Second, although a party may not be permitted to withdraw from a settlement based on a mere change of heart, plaintiffs can cite no authority for the proposition that a party may be bound by a proposed consent decree that would violate third parties' constitutional and statutory rights. Indeed, in *Local No. 93*, this Court held that, although a consent decree may provide for "broader

relief than the court could have awarded after a trial," the parties may not "agree to take action that conflicts with or violates the statute upon which the complaint was based." 478 U.S. at 526, *quoted in White v. Alabama*, 74 F.3d 1058, 1074 (11th Cir. 1996). As became clear from intervening Eleventh Circuit decisions, Consent Decrees II and III violated Title VII, as well as other statutory and constitutional rights of third parties. Because, under *Local No. 93*, the parties "may not agree" to such provisions, it should follow that, where a party has agreed to illegal provisions out of ignorance, it must be permitted to withdraw its consent.

Most of the cases cited in the petition do not involve an illegal consent decree, much less one discovered to be illegal after its submission to the court. The issue in *King v. Walters*, 190 F.3d 784, 790 (7th Cir. 1999); *United States v. North Carolina*, 180 F.3d 574, 582 (4th Cir. 1999); *Moore v. Beaufort County*, 936 F.2d 159, 164 (4th Cir. 1991); *Pennsylvania Steel Foundry & Mach. Co. v. Secretary of Labor*, 831 F.2d 1211, 1220 (3rd Cir. 1987) (declining to decide whether administrative review commission had "power" to permit a party to withdraw consent); and *Collins v. Thompson*, 679 F.2d 168, 172-73 (9th Cir. 1982); *George Banta Co. v. NLRB*, 604 F.2d 830, 834-36 (4th Cir. 1979), *cert. denied*, 445 U.S. 927 (1980) (declining to decide whether special circumstances might justify withdrawal of consent), was whether a party was free to withdraw from a consent decree before its entry by the district court based on nothing more than that party's change of heart.

The only case that comes close to the issue presented here is *Ibarra v. Texas Employment Comm'n*, 823 F.2d 873 (5th Cir. 1987). The *Ibarra* court found, however, that it

need not reach the question of whether the proposed decree was legal because the case could be decided based on the Commission's "mistake" in believing that its legality was beyond question. *Id.* at 879. Rather than granting the Commission the right to withdraw on account of this mistake, the court reached the same result by holding that the district court abused its discretion in approving the consent decree under the circumstances. *Id.*

Plaintiffs appear to argue that defendants were bound to advocate approval of Consent Decrees II and III, but would be free to seek modification of the decrees in the event of their entry by the district court. Where a consent decree is illegal or unconstitutional, however, it may not be entered by the district court. If the district court may not enter a proposed decree because of illegality, the issue of whether the parties may or may not withdraw their consent is of no consequence. No purpose would be served by this Court's engaging in such a hair-splitting exercise.

Finally, plaintiffs argue that even if illegality justified withdrawal of consent, withdrawal could be permitted only if the trial court agreed that the consent decree was illegal. Of course, in the present case, the trial court entered the order adopting Article Thirteen, ¶ 4 without permitting the defendants or Adams Intervenors to present evidence in support of their objections.

Certainly, there can be no question that a party may not feign a concern as to the legality of a consent decree as an excuse to escape its provisions. If a court concludes that there is no reasonable basis for such a concern, the

parties' efforts to withdraw consent might fairly be disregarded. In light of the intervening decisions of the Eleventh Circuit in *Ensley Branch* and *In re Birmingham*, however, the district court could not conclude that defendants' objections were made in bad faith.

Indeed, the Eleventh Circuit may have concluded from the record that defendants' concerns about the legality of Consent Decrees II and III (or about Article Thirteen, ¶ 4 in particular) were well founded. If so, it is not surprising that this conclusion was not spelled out in the opinion. Because the district court's order was also defective due to procedural irregularities, lack of consent by the Adams Intervenors, and lack of consent to adoption of a single paragraph in isolation, further discussion about the legality of Article Thirteen, ¶ 4 would have been superfluous. Therefore, the Eleventh Circuit should not be faulted for failing to delve further into that issue before concluding that the defendants could withdraw their consent. At the very least, it is plain that the Eleventh Circuit did not consider defendants' concerns about the illegality of the race-conscious provisions to be unfounded or insincere.

In light of intervening Eleventh Circuit decisions addressing the legality of race-conscious provisions of consent orders and the lack of agreement by a necessary party, the Eleventh Circuit properly concluded that defendants could withdraw their consent from Consent Orders II and III. No issue worthy of a writ of certiorari arises out of this conclusion.

III. The Issues Raised in the Petition Are Not Dispositive, Because the Eleventh Circuit's Other Grounds for Reversing the District Court's Order Are Not Challenged

As previously discussed, the Adams Intervenors' objections and the defendants' withdrawal of consent to Consent Decrees II and III were only two of a number of grounds for the Eleventh Circuit's reversal of the district court's order. The Petition does not seek review of the Eleventh Circuit's conclusions that the order was improperly entered *sua sponte* or that the district court was not authorized to enter a single paragraph from a lengthier proposed consent decree.

Moreover, although not discussed at length in the Eleventh Circuit's decision, it is clear from the record that the procedures followed by the district court did not meet even the minimum due process requirements applicable to all intervenors. As this Court held in *Local No. 93,* even an intervenor whose legal rights are not infringed – and thus has no right to insist upon a full-blown trial – is entitled to "present evidence and have its objections heard at hearings on whether to approve a consent decree." 478 U.S. at 529. The district court made no pretense of permitting the Adams Intervenors to present such evidence before implementing Article Thirteen, ¶ 4. Rather, the only evidence received by the district court with respect to plaintiffs' discrimination claims was from the plaintiffs' unfinished case-in-chief during the aborted 1992 trial.

Because the Eleventh Circuit's decision is due to be affirmed for a multitude of reasons, this Court's review of

two of the articulated grounds for that decision would amount to a mere advisory opinion. Therefore, the issues raised by the Petition do not merit this Court's attention.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

SUSAN S. WAGNER
Counsel of Record
LISA W. BORDEN
BERKOWITZ, LEFKOVITS, ISOM & KUSHNER
A PROFESSIONAL CORPORATION
SouthTrust Tower
420 North 20th Street, Suite 1600
Birmingham, Alabama 35203-5202
(205) 328-0480

Counsel for Respondents
Paul Bowlin, et al.